

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

August 26, 2009

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

Re: SOAH Docket No. 582-08-3929; TCEQ Docket No. 2007-0859-MLM-E; In Re:  
Executive Director of the Texas Commission on Environmental Quality v.  
Tommy Rutledge and B&M Freight, Respondents

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than September 15, 2009. Any replies to exceptions or briefs must be filed in the same manner no later than September 25, 2009.

This matter has been designated **TCEQ Docket No. 2007-0859-MLM-E; SOAH Docket No. 582-08-3929**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in black ink, appearing to read "Lilo D. Pomerleau".

Lilo D. Pomerleau  
Administrative Law Judge

LDP:nl  
Enclosures  
cc: Mailing List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** TOMMY RUTLEDGE AND B & M UNCLAIMED FREIGHT, INC  
**SOAH DOCKET NUMBER:** 582-08-3929  
**REFERRING AGENCY CASE:** 2007-0859-MLM-E

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**STATE OFFICE OF ADMINISTRATIVE  
HEARINGS**

**ADMINISTRATIVE LAW JUDGE  
ALJ LILO D. POMERLEAU**

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**REPRESENTATIVE / ADDRESS**

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TOMMY RUTLEDGE

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JULIA FLETCHER  
B & M UNCLAIMED FREIGHT  
302 W. NAVASOTA P.O. BOX 222  
GROESBECK, TX 76642

B & M UNCLAIMED FREIGHT

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xc: Docket Clerk, State Office of Administrative Hearings

**SOAH DOCKET NO. 582-08-3929  
TCEQ DOCKET NO. 2007-0859-MLM-E**

<b>IN THE MATTER OF</b>	§	<b>BEFORE THE STATE OFFICE</b>
	§	
<b>AN ENFORCEMENT ACTION</b>	§	
	§	<b>OF</b>
<b>AGAINST B&amp;M UNCLAIMED</b>	§	
<b>FREIGHT, INC.;</b>	§	
	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>RN105171078</b>		

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) seeks to assess twelve thousand, five hundred dollars (\$12,500) in administrative penalties against, and require certain corrective actions by, B&M Unclaimed Freight, Inc. (Respondent) for violations of TEX. WATER CODE ANN. § 26.121(a)(1); TEX. HEALTH & SAFETY CODE § 382.085(b), and 30 TEX. ADMIN. CODE §§ 111.201, 327.5(a), and 330.15(c). Respondent operates a storage facility at 3951 Highway 164 East, Groesbeck County, Texas (the Site). The ED alleges that Respondent failed to prevent and immediately abate and contain a spill or discharge of municipal solid waste into or adjacent to any waters, failed to comply with the prohibition on outdoor burning, and failed to dispose of municipal solid waste at an authorized facility. As set out below, the Administrative Law Judge (ALJ) finds that the Respondent committed the alleged violations and recommends that the Commission assess a penalty of \$12,500 against, and require certain corrective actions by, Respondent.

**II. JURISDICTION**

Respondent does not dispute the Commission's jurisdiction, so no further discussion regarding notice or jurisdiction is included here. The attached Proposed Order contains the required Findings of Fact and Conclusions of Law.

### III. PROCEDURAL HISTORY

The ED originally initiated this enforcement action against both Tommy Rutledge,<sup>1</sup> the owner of the property where the Site is located, and Respondent, the operator of an unclaimed freight salvage business located on Mr. Rutledge's property. The parties waived the preliminary hearing and jurisdictional documents were admitted by order on September 5, 2008, and the hearing was set on the agreed date of April 2, 2009. The ED filed a joint motion for continuance on March 19, 2009, and the hearing on the merits was reset to July 28, 2009.

On July 28, 2009, the ALJ convened the hearing. The ED appeared and was represented by Tracy Chandler, staff attorney. Respondent appeared and was represented *pro se* by Julia Fletcher, President. Mr. Rutledge also entered an appearance. The ED stated that a settlement agreement between the ED and Mr. Rutledge had been finalized and no contested issues remained concerning Mr. Rutledge. Accordingly, the ED moved for severance of issues relating to Mr. Rutledge and remand to the ED. This was granted and the hearing concerning the allegations against Respondent proceeded. The record was closed that same day.

### IV. APPLICABLE LAW

The ED alleges that Respondent violated the Texas Water Code and the Texas Health & Safety Code and several provisions of the Commission's rules by storing unauthorized municipal solid waste, allowing municipal solid waste to discharge into or adjacent to water, burning material on the property without authorization to do so, and failing to immediately abate and contain a spill or discharge.

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<sup>1</sup> Mr. Rutledge testified at the hearing that his full name is Jules Thomas Rutledge, but he is known and identified in the pleadings as Tommy Rutledge.

**A. Texas Water Code**

The Texas Water Code prohibits any person from discharging municipal or industrial waste into or adjacent to any water in the state.<sup>2</sup>

**B. Texas Health & Safety Code**

The Texas Health & Safety Code states that a person may not cause, suffer, allow, or permit the emission of any air contaminant or the performance of any activity in violation of any Commission rule or order.<sup>3</sup> In regard to burning, the Commission's rules state:

No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the Commission. Outdoor disposal or deposition of any material capable of igniting spontaneously, with the exception of the storage of solid fossil fuels, shall not be allowed without written permission of the Executive Director. . . .<sup>4</sup>

**C. Relevant Rules**

The Commission's rules pertaining to this case concern air pollution, the prevention of spills or discharges into Texas waters, and clean up if a spill or discharge occurs.

30 TEX. ADMIN. CODE § 111.201 pertains to control of air pollution.

No person may cause, suffer, allow, or permit any outdoor burning within the State of Texas, except as provided by this subchapter or by orders or permits of the commission. Outdoor disposal or deposition of any material capable of igniting spontaneously, with the exception of the storage of solid fossil fuels, shall not be allowed without written permission of the executive director.

30 TEX. ADMIN. CODE § 327.2(3) defines a discharge or spill:

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<sup>2</sup> TEX. WATER CODE § 26.121(a) and (c).

<sup>3</sup> TEX. HEALTH & SAFETY CODE § 382.085(b).

<sup>4</sup> 30 TEX. ADMIN. CODE § 111.201.

Discharge or spill--An act or omission by which oil, hazardous substances, waste, or other substances are spilled, leaked, pumped, poured, emitted, entered, or dumped onto or into waters in the State of Texas or by which those substances are deposited where, unless controlled or removed, they may drain, seep, run, or otherwise enter water in the State of Texas.

30 TEX. ADMIN. CODE § 327.5(a) pertains to spill prevention and control:

The responsible person shall immediately abate and contain the spill or discharge and cooperate fully with the executive director and the local incident command system. The responsible person shall also begin reasonable response actions which may include, but are not limited to, the following actions:

- (1) arrival of the responsible person or response personnel hired by the responsible person at the site of the discharge or spill;
- (2) initiating efforts to stop the discharge or spill;
- (3) minimizing the impact to the public health and the environment;
- (4) neutralizing the effects of the incident;
- (5) removing the discharged or spilled substances; and
- (6) managing the wastes.

30 TEX. ADMIN. CODE § 330.15(a) and (c) regulates the handling and disposal of municipal solid waste:

(a) A person may not cause, suffer, allow or permit the collection, storage, transportation, processing, or disposal of municipal solid waste (MSW), or the use or operation of a solid waste facility to store, process, or dispose of solid waste, or to extract materials under Texas Health & Safety Code § 361.092, in violation of the Texas Health & Safety Code, or any regulations, rules, permit, license, order of the Commission, or in such a manner that causes: (1) the discharge or imminent threat of discharge of MSW into or adjacent to the waters in the state without obtaining specific authorization for the discharge from the Commission.

(c) Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of municipal solid waste without the written authorization of the Commission.

## V. EVIDENCE

The ED alleges that Respondent is responsible for three violations that occurred at the Site.

- On February 16, 2007, Respondent burned wooden pallets and household trash in a burn pit on the Site in violation of a prohibition on outdoor burning. The fire in the burn pit became uncontrollable and spread—engulfing containers and drums containing unknown chemicals and acids; a transformer; batteries; tires; and other municipal solid waste materials—consuming approximately 3.5 acres.
- Once the fire spread to the Site, Respondent failed to prevent and immediately abate and contain a spill or discharge of MSW into or adjacent to Texas waters.
- Respondent failed to dispose of municipal solid waste at an authorized facility during operation of the unclaimed salvage business. The Site contained approximately 5,000 cubic yards of waste and had been accumulating municipal solid waste for years.

### A. The Fire: Unauthorized Burning and Failure to Prevent and Immediately Abate

Jay Travis Halespeska, Environmental Investigator for the TCEQ's Waco regional office, and Jason Neumann, also with the TCEQ, initially visited the Site on February 16, 2007, after Matt Groveton, Limestone County Emergency Management Coordinator, contacted TCEQ's Waco office because a fire had engulfed a storage facility. The fire was burning an estimated 3.5 acres of abandoned and unlabeled drums, trash material, vehicles, tires, metal, and other waste.<sup>5</sup> Mr. Groveton stated that several houses had been evacuated downwind from the fire because of the unknown amount and type of chemicals encompassed in the fire. Moreover, the Waco Fire Department elected not to use water to put out the fire because of the unknown chemicals and they did not have enough foam to fight a fire of that magnitude. The fire was allowed to burn through the night. Mr. Rutledge, the property owner, was present, and Mr. Halespeska informed him that he was responsible and needed to hire an environmental contractor or consultant to assess the site and initiate the cleanup activities.

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<sup>5</sup> His findings were documented in an investigative report. ED Ex. 1, TCEQ Investigation Report. Also, pictures of the fire can be found at ED Ex. 2 at 2-3.

On the evening that the fire began, Jason Daniel Sandell, who served as a Deputy Sheriff with the Limestone County Sheriff's Office, took statements from Ms. Fletcher and Respondent's employees.<sup>6</sup> Ms. Fletcher admitted that she instructed her employees to burn trash in the burn pit. Margaret Jeavons and Terry Carshall stated that they had been told to burn wood pallets. Ms. Jeavons and Mr. Carshall stated that they expressed their concerns about the wind that day, but Ms. Fletcher had told them the wind was not too bad. The fire was started at 3:00 p.m. At approximately 3:15 p.m., Ms. Fletcher was notified that the fire had become unmanageable.

Mr. Halepeska returned to the site the next day, February 17, 2009. He observed that the fire had abated considerably but smoldering debris was causing smoke to drift across Highway 164. Approximately 85 percent of the area was burned. The fire appeared to have begun in a burn pit, which was approximately four to five feet wide. Mr. Halepeska observed barrels, municipal solid waste, a battery, melted plastic, containers of muriatic acid, transformers,<sup>7</sup> metals, paint containers, and piles of debris on the property. A seasonal creek bed contained waste and barrels of unknown substances, which were discharging on the ground.<sup>8</sup> That day, Mr. Halepeska again spoke with Mr. Rutledge about hiring contractors to assess the site and begin cleanup.

On February 19, 2007, Mr. Halepeska met with Mr. Rutledge; other TCEQ personnel; Mr. Groveton; Mr. Sandell, Limestone County Sheriff's Office; Mike Thompson, Groesbeck Volunteer Fire Department; Mike Jablonouski, Texas Department of Transportation; and Harry Hodges, Environmental Consultant. Mr. Halepeska was informed that Respondent had a lease agreement with Mr. Rutledge and was the operator of the unclaimed salvage facility on the Site. Respondent's President, Ms. Fletcher, was not there. Mr. Halepeska gave Mr. Rutledge a deadline of February 26, 2007, to submit a written action plan.

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<sup>6</sup> See ED Ex. Nos. 5-7, Limestone County Sheriff's Department voluntary statements.

<sup>7</sup> Mr. Halepeska testified that transformers may contain PCBs and other carcinogenic material.

<sup>8</sup> See ED Ex. 2, pictures.

Subsequent to the February 16, 2007 fire, Respondent (Ms. Fletcher) was also notified that she needed to submit an action plan. Respondent and Mr. Rutledge submitted a plan on February 26, 2007.<sup>9</sup> Mr. Halepeska indicated that these plans were vague, inadequate, and unrealistic because it would take longer than two to three weeks to test both the content of the drums and soil. Because the drums' contents could no longer be identified after the fire, they could not be disposed of properly. Mr. Halepeska required both Respondent and Mr. Rutledge to submit another plan addressing his concerns. Respondent did not do so. Additionally, it was clear from Respondent's plan that Ms. Fletcher and Mr. Rutledge, who once had a personal relationship, were not communicating.

On March 23, 2007, Pamela Gilder and Mr. Halepeska, both from the TCEQ Waco Regional Office, conducted a follow up investigation of the Site. The investigators noted that no corrective action had been taken. Although several trailers had been loaded with barrels, some of the barrels were discharging their contents onto the floor of the trailers and onto the ground, and most barrels were still on the ground and exposed to the environment. None of the municipal solid waste or scrap metal on the site had been removed. Open jugs of wallpaper paste, paint, open containers of muriatic acid, Naphtha, and drain openers were exposed to the environment. Although Mr. Rutledge had built earthen dams across the seasonal creek, one dam did not entirely span the creek and the other had been washed out by heavy rains. Municipal solid waste and assorted materials were dumped into a drainage feature of a dry creek. The investigators observed a chemical sheen on the surface of the water, which was discharging off the property. Additionally, they observed a chemical sheen on the surface of a small pond near the back of the property.<sup>10</sup>

#### **B. Improper Disposal of Municipal Solid Waste**

Mr. Rutledge testified that Respondent was the only operator on his property. Respondent began operating an unclaimed freight business in 2001 or 2002, buying trailers of unclaimed or damaged freight and reselling those materials. Mr. Rutledge and Respondent

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<sup>9</sup> ED Ex. 1 at 14-15.

<sup>10</sup> ED Ex. 9 at 3, Investigation Report. *See also* ED 10.

signed a seven-year lease agreement on May 8, 2002.<sup>11</sup> The agreement required Mr. Rutledge to build a storage building and allowed Respondent to use the premises for storage. Mr. Rutledge became an employee of Respondent and drove, loaded, and unloaded trailers. He testified that for a number of years, the freight company required Respondent to purchase an entire lot of salvage materials, which could have included harmful materials. But in 2005 or 2006, the freight company allowed Respondent to return unsold or unwanted materials.

Mr. Rutledge quit as Respondent's employee on July 10, 2006. According to Mr. Rutledge, the materials on the property belonged to Respondent. However, some time before the fire, Mr. Rutledge stated that he had undertaken some clean up of the property and had moved barrels out of the weather into a trailer out of "environmental concern." Despite Mr. Rutledge's testimony that the materials on the property were Respondent's, Mr. Rutledge was aware of and, as landowner, responsible for the municipal solid waste that had accumulated on his property for years.

Frank Burluson, Section Manager for the Water and Waste Sections of the TCEQ Waco Regional Office, testified that the Site contained municipal solid waste. In his opinion, Respondent, as owner and operator of a business that collected salvage, was responsible for the municipal solid waste found on the Site. He also testified that burning wood pallets is an air quality violation. Mr. Burluson reviewed Respondent's waste removal plan and found: (1) the focus of the plan was on salvage, not clean up and removal; (2) the plan did not coordinate with Mr. Rutledge, the owner of the property; and (3) the suggested solutions were significantly inadequate. In his opinion, the magnitude of the damage to, size of, and unknown materials on the Site required a consultant or someone with a great deal of knowledge and experience to oversee a clean up that would conform to applicable environmental rules.

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<sup>11</sup> ED Ex. 3.

**C. Proposed Penalty**

After reviewing Mr. Halepeska's report and looking at photographs of the Site, Colin Barth, a TCEQ Enforcement Coordinator, prepared a penalty calculation worksheet.<sup>12</sup> Because Mr. Barth is no longer an enforcement coordinator, Michael Mayer, also a TCEQ Enforcement Coordinator, reviewed the documents and photographs, including the penalty calculation worksheet, and testified at the hearing.

Mr. Mayer indicated that Respondent failed to prevent and immediately abate a discharge into or adjacent to Texas waters and that a base penalty of \$2,500 is appropriate for the violation. Because the TCEQ enforcement team observed this violation on March 23, 2007, and the violation was screened on May 22, 2007, Mr. Mayer found it appropriate to calculate the penalty for two monthly events (60 violation days), raising the penalty to \$5,000.

Mr. Mayer also testified that Respondent failed to comply with the prohibition on outdoor burning. Because moderate harm to human health or the environment actually resulted from the fire, a base penalty of \$2,500 is appropriate.

Mr. Mayer also noted that Respondent failed to dispose of municipal solid waste at an authorized facility, with approximately 5,000 cubic yards of waste found at the site. For this violation, Mr. Mayer stated that a base penalty of \$2,500 is appropriate, with two monthly events (60 violation days), raising the penalty to \$5,000.

Mr. Mayer testified that in total, the ED seeks \$12,500 in penalties from Respondent for the three violations and a requirement that Respondent take further corrective measures.

**D. Respondent's Concerns**

Before the fire occurred, Ms. Fletcher noted that Respondent did not take hazardous material from the freight company in the course of its operations. Rather, it was her contention

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<sup>12</sup> ED Ex. 17 at 25-32.

that Mr. Rutledge, out of anger and revenge, moved barrels onto his property, buried some storage containers in the ground, and placed items into a storage facility on the Site. She believed he was responsible for the hazardous waste. She also testified that she had tried to get Mr. Rutledge to clean up the property on several different occasions well before the fire occurred, but Mr. Rutledge merely moved a few things around and never completed the job. Ms. Fletcher noted that Respondent owned equipment and merchandise on the Site that was destroyed in the fire. She stated that the merchandise had a value of approximately \$500,000 before the fire, but the remains of these items were now waste.

According to Ms. Fletcher, a second fire was started on February 16, 2009. She believes that the fire that consumed the Site did not originate from the burn pit but was deliberately set by either Mr. Rutledge or Mr. Carshall, acting on orders by Mr. Rutledge. Ms. Fletcher believes that Mr. Rutledge became aware that he could terminate the lease if there was a fire on the property. In response to her questions, Mr. Sandell confirmed that the County Sheriff's Office did not conduct an investigation into the cause of the fire. He further stated that he had not heard about Mr. Carshall or Mr. Rutledge starting a second fire. Mr. Rutledge testified that he was not in town when the fire began and had not caused the fire to be set.

Ms. Fletcher stated that she was prevented from going on the property after the fire. While Mr. Rutledge testified that there was a criminal trespass warning issued against Respondent's employees, Ms. Jeavons and Mr. Carshall, he was unclear whether Respondent was prevented from going on the property. He did state that he was trying to gain control of the clean up and stop the environmental impact. He hired a consultant, moved and stored barrels in trailers, and also sold some of Respondent's scrap metal, which was found after the fire. He testified that he used any such proceeds for remediation.

In sum, Respondent believes that Mr. Rutledge failed to help clean up the property long before the fire destroyed the Site, moved barrels onto the property, and had his agents set a second fire. He then prevented her from going onto the property after the fire. She was unable to recoup any scrap materials or assist in the clean up. Thus, it is her position that Mr. Rutledge be required to clean up the mess.

## VI. ALJ'S RECOMMENDATION

The evidence and testimony indicates that both Respondent and Mr. Rutledge were responsible for improperly disposing municipal solid waste and discharging waste into Texas waters. Respondent owned and operated a business that bought trailer loads full of material for resale. Items from the salvage business and possibly other municipal solid waste were piled and stored on approximately three and a half acres of land owned by Mr. Rutledge. Respondent, as an operator, was responsible the actions of her employees, including Mr. Rutledge's, when he was her employee. Both Mr. Rutledge and Respondent were responsible for the accumulation of dangerous chemicals without proper storage and for the trash strewn along the dry creek beds, piles of paper, metals, and other materials.

Respondent is responsible for improperly burning materials on February 16, 2007. Although Respondent may not have been aware that burning wood pallets violated the Texas Health & Safety Code, Respondent ordered her employees to burn the pallets on a windy day. Because the burn pit was situated too close to other materials, the fire became uncontained and caused a larger fire, which led to a spill or discharge into or adjacent to Texas waters.

The ALJ acknowledges that the relationship between Ms. Fletcher and Mr. Rutledge was strained before the fire began. It is no surprise that Respondent (as operator) and Mr. Rutledge (as owner) failed to tackle together the serious and immediate problem of properly disposing of the resulting waste after the fire. Respondent clearly failed to understand the seriousness of the violations and the need to immediately contain and abate the waste. Respondent failed to respond to the TCEQ when required to do so. However, she had conversations with both Mr. Burlison and Mr. Halepeska and could have made an attempt to understand what was required of her, but she did not do so. At the hearing, Respondent continued to avoid taking responsibility for her actions and her role in the events that led to the TCEQ's enforcement action. Rather, Ms. Fletcher's focus remained on what Mr. Rutledge did, may have done, or failed to do. As both Mr. Burlison and Mr. Halepeska noted, the TCEQ is not required to assist either an owner or operator when they are unable to communicate with each other. The TCEQ's focus is clearly on the prevention of pollution and damage to the environment.

The Commission is authorized to assess an administrative penalty against a person who violates provisions of the Texas Water Code and Texas Health & Safety Code within the Commission's jurisdiction or a rule adopted by the Commission. In this case, the penalty may not exceed \$10,000 per day of violation.<sup>13</sup> Additionally, the Commission may order the violator to take corrective action.<sup>14</sup> The ALJ finds that the administrative penalty recommended by Staff is warranted on the grounds that Respondent violated the environmental laws and regulations noted above. The ED appropriately considered the factors set forth in TEX. WATER CODE ANN. §§ 7.053 and 13.4151 and followed the Commission's Penalty Policy in calculating the total proposed penalty in the amount of \$12,500.

This amount is reasonable, as the ED sought penalties for only three violations when each day of clean up delay could have been included as separate violations. Moreover, Respondent has not participated in any clean up or remediation to date.

## VII. CONCLUSION

The ALJ recommends that the Commission adopt the Findings of Fact and Conclusions of Law set forth in the attached Proposed Order concluding that the alleged violations occurred, assessing an administrative penalty of \$12,500 against Respondent for the violations alleged and established in this proceeding, and requiring corrective action by Respondent.

**SIGNED August 26, 2009.**



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**LILLO D. POMERLEAU**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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<sup>13</sup> TEX. WATER CODE ANN. § 7.054(c).

<sup>14</sup> TEX. WATER CODE ANN. § 7.073.

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



**AN ORDER Assessing Administrative Penalties Against  
and Requiring Corrective Action By  
B & M Unclaimed Freight  
TCEQ DOCKET NO. 2007-0859-MLM-E  
SOAH DOCKET NO. 582-08-3929**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (Commission or TCEQ) considered the Executive Director's Report and Petition (EDPRP) recommending that the Commission enter an enforcement order assessing administrative penalties against and requiring corrective action by B & M Unclaimed Freight (Respondent). Lilo D. Pomerleau, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), conducted a public hearing on this matter on July 28, 2009, in Austin, Texas, and presented the Proposal for Decision.

The parties to the proceeding are Respondent; the Commission's Executive Director (ED), represented by Tracy Chandler, attorney in TCEQ's Litigation Division; and the Office of Public Interest Counsel. After considering the ALJ's Proposal for Decision, the Commission makes the following Findings of Fact and Conclusions of Law.

## **I. FINDINGS OF FACT**

1. Respondent leases property at 3951 Highway 164 East, Groesbeck, Limestone County, Texas, and operates an unclaimed freight and salvage business on this property. The site consists of approximately three and half acres (the Site).
2. The Site is owned by Jules Thomas Rutledge aka Tommy Rutledge.
3. On February 16, 2007, Respondent burned wooden pallets and household trash in a burn pit on the Site in violation of a prohibition on outdoor burning. The fire in the burn pit

became uncontrollable and spread—engulfing containers and drums containing unknown chemicals and acids; a transformer; batteries; tires; and other municipal solid waste materials—on approximately 3.5 acres.

4. The burn did not meet an exception to the prohibition on outdoor burning.
5. As a result of the fire, the Waco Fire Department was called to the Site, but elected not to use water because the Site contained drums and barrels containing unknown chemicals.
6. As of February 16 and 17, 2007, approximately 5,000 cubic yards of municipal solid waste had been disposed of or discharged at the Site, including wood pallets, abandoned and unlabeled drums, trash material, vehicles, tires, metal, paint and paint containers, transformers, batteries, and municipal solid waste.
7. A seasonal creek bed contained waste and barrels of unknown substances, which were discharging on the ground.
8. On February 26, 2007, Respondent and Mr. Rutledge each submitted an inadequate action plan to address cleaning up and remediating the Site. Although both Respondent and Mr. Rutledge were informed that the plans were inadequate, Respondent took no further action.
9. On July 29, 2008, the TCEQ issued a Notice of Enforcement for Compliance Evaluation Investigation to Respondent and Tommy Rutledge.
10. On June 30, 2008, the ED issued the Executive Director's First Amended Report and Petition (EDPRP) in accordance with TEX. WATER CODE ANN. § 7.054, alleging that Respondent violated 30 TEX. ADMIN. CODE § 327.5(a) and TEX. WATER CODE ANN. § 26.121(a)(1) by failing to prevent and immediately abate and contain a spill or discharge of municipal solid waste into or adjacent to any Texas waters. The ED also alleged that Respondent violated 30 TEX. ADMIN. CODE § 111.201 and TEX. HEALTH & SAFETY CODE § 382.085(b) by failing to comply with the prohibition on outdoor

burning. The ED further alleged that Respondent violated 30 TEX. ADMIN. CODE § 330.15(c) by failing to dispose of municipal solid waste at an authorized facility.

11. The ED recommended the imposition of an administrative penalty in the amount of \$12,500 and corrective action by both Respondent and Tommy Rutledge to bring the Site into compliance.
12. The proposed penalty includes a base penalty of \$5,000 for failing to prevent and immediately abate a spill or discharge of municipal solid waste into or adjacent to any state waters; plus a base penalty of \$2,500 for failing to comply with the prohibition on outdoor burning; plus a base penalty of \$5,000 for failing to dispose of municipal solid waste at an authorized facility.
13. An administrative penalty of \$12,500 takes into account culpability, economic benefit, good faith efforts to comply, compliance history, release potential, and other factors set forth in TEX. WATER CODE ANN. § 7.053 and in the Commission's 2002 Penalty Policy.
14. On September 26, 2007, and March 11, 2008, Respondent and Mr. Rutledge, respectively, requested a contested case hearing on the allegations in the EDPRP.
15. On July 14, 2008, the case was referred to SOAH for a hearing.
16. On July 29, 2008, the Commission's Chief Clerk issued a notice of the preliminary hearing to all parties, which included the date, time, and place of the hearing, the legal authority under which the hearing was being held, and the violations asserted.
17. On September 4, 2008, the parties jointly filed a request to waive the preliminary hearing. This request was granted and jurisdictional documents were admitted by order on September 5, 2008.
18. The hearing on the merits was conducted on July 28, 2009, in Austin, Texas, by ALJ Lilo D. Pomerleau. The ED, represented by his attorney, Tracy Chandler, and Respondent represented by its President, Julia Fletcher, appeared.

19. At the hearing, the ED announced that a settlement had been reached with Mr. Rutledge and requested that all matters pertaining to Mr. Rutledge be severed and remanded to the ED for processing. An order was issued on August 3, 2009, granting the ED's request and remanding those issues to the ED.
20. The ALJ issued the Proposal for Decision on August 26, 2009.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code, the Texas Health & Safety Code, or any rule, order, or permit adopted or issued thereunder.
2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed \$10,000 per violation, per day, for each of the violations at issue in this case.
3. Respondent is subject to the Commission's enforcement authority, pursuant to TEX. WATER CODE ANN. § 7.002.
4. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.
5. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§ 1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violations or the penalties or corrective actions proposed therein.
6. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6, Respondent was notified of the hearing on the alleged violations and the proposed penalties.

7. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
8. Based on the above Findings of Fact and Conclusions of Law, Respondent violated TEX. WATER CODE § 26.121(a)(1); TEX. HEALTH & SAFETY CODE § 382.085(b), and 30 TEX. ADMIN. CODE §§ 111.201, 327.5(a), and 330.15(c).
9. In determining the amount of an administrative penalty, the ED considered several factors, as required by TEX. WATER CODE ANN. § 7.053, including:
  - The impact or potential impact on public health and safety, natural resources and their uses, and other persons;
  - The nature, circumstances, extent, duration, and gravity of the prohibited act;
  - The history and extent of previous violations by the violator;
  - The violator's degree of culpability, good faith, and economic benefit gained through the violation;
  - The amount necessary to deter future violations; and
  - Any other matters that justice may require.
10. The Commission has adopted a Penalty Policy setting forth its policy regarding the computation and assessment of administrative penalties, effective September 1, 2002.
11. Based on consideration of the above Findings of Fact, the factors set out in TEX. WATER CODE ANN. § 7.053, and the Commission's Penalty Policy, the Executive Director correctly calculated the penalties for the alleged violation and a total administrative penalty of \$12,500 is justified and should be assessed against Respondent.
12. Based on the above Findings of Fact, Respondent should be required to take the corrective action measures that the Executive Director recommends.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**

1. B&M Unclaimed Freight, Inc., Julia Fletcher (B&M) is assessed an administrative penalty in the amount of \$12,500 for violations of TEX. WATER CODE ANN. § 26.121(a)(1); TEX. HEALTH & SAFETY CODE § 382.085(b), and 30 TEX. ADMIN. CODE §§ 111.201, 327.5(a), and 330.15(c). The payment of this administrative penalty and B&M's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order in this action. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: B&M Unclaimed Freight, Inc.; Docket No. 2007-0859-MLM-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

2. Immediately upon the effective date of this Order, B&M shall:
  - a. Cease all unauthorized burning and accepting of any additional waste at the Site, in accordance with 30 TEX. ADMIN. CODE §§ 111.201 and 330.15(c);
  - b. Cease discharging any additional waste into or adjacent to any waters in the state, in accordance with TEX. WATER CODE ANN. § 26.121(a)(1); and
  - c. Implement procedures to prevent and abate any future spills or discharges of municipal solid waste into or adjacent to any waters in the state, in accordance with 30 TEX. ADMIN. CODE § 327.5(a).
3. Within 30 days after the effective date of the Commission Order, B&M shall remove all municipal solid waste and unlabeled waste from the Site and dispose of it an authorized facility, in accordance with 30 TEX. ADMIN. CODE § 382.085(b).
4. Within 60 days after the effective date of the Commission Order, B&M shall:

Collect representative soil or other appropriate media samples to evaluate the impact of the release and prepare an environmental site assessment to determine whether the release is subject to the Texas Risk Reduction Program (TRRP) rules in 30 TEX. ADMIN. CODE ch. 350. The environmental site assessment shall be conducted in accordance with the TCEQ guidance document "Determining Which Releases are Subject to TRRP" revised October 21, 2003. The environmental site assessment, including remediation plans or justification for no further action, as applicable, shall be submitted for review and approval to:

Environmental Cleanup Section  
Remediation Division, MC 137 or 221  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

5. If the release is subject to TRRP, B&M shall comply with all applicable requirements of the Texas Risk Reduction Program found in 30 TEX. ADMIN. CODE ch. 350, which may include: plans, reports, and notices under Subchapter E (30 TEX. ADMIN. CODE §§ 350.33(1), 350.92, and 350.96; financial assurance (30 TEX. ADMIN. CODE § 350.33(1)); and Institutional Controls under Subchapter F and respond completely and adequately, as determined by the TCEQ, to all letter requests for information within 30 days after the date of such letters, or by any other deadline specified in writing.
6. Within 75 days after the effective date of the Commission Order, B&M shall submit written certification as described below, and include detailed supporting documentation including photographs, receipts, and/or other records to demonstrate compliance with Ordering Provision Nos. 2 through 5. The certification shall be notarized by a State of Texas Notary Public and include the following certification language:

"I certify under penalty of law that I have personally examined and am familiar with the information submitted and all attached documents, and that based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

The certification shall be submitted to:

Order Compliance Team  
Enforcement Division, MC 149A  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

with a copy to:

Frank Burleson, Waste Section and Waste Section Manager  
Texas Commission on Environmental Quality  
Waco Regional Office  
6801 Sanger Avenue, Suite 2500  
Waco, Texas 76710-7826

and

Gary Goldman, Air Section Manager  
Texas Commission on Environmental Quality  
Waco Regional Office  
6801 Sanger Avenue, Suite 2500  
Waco, Texas 76710-7826

7. The Executive Director may refer this matter to the Office of the Attorney General of the State of Texas (OAG) for further enforcement proceedings without notice to Respondent if the Executive Director determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
8. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
9. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.
10. As required by TEX. WATER CODE ANN. § 7.059, the Commission's Chief Clerk shall forward a copy of this Order to Respondent.
11. If any provision, sentence, clause, or phrase of this Order is for any reason held to be

invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Buddy Garcia, Chairman**  
**For the Commission**